MICHIGAN
LAW REVIEW

VOL. II NOVEMBER, 1903 No. 2

# THE FELLOW SERVANT DOCTRINE IN THE UNITED STATES SUPREME COURT

THE difficulties of the fellow servant doctrine in the United States Supreme Court have been thought to centre principally about the *Ross case*.[1] The *Baugh case*,[2] has been said to go far toward overruling it, and the more recent case of *New England Railroad Co.* v. *Conroy*,[3] is now taken as overruling it in terms. Nevertheless, the writer believes that the results of all three cases may be supported upon a common principle. This principle it is the object of this article to suggest.

In attempting to draft such a principle there are some preliminary conditions indicated by the drift of the cases in the United States Supreme Court, which must be complied with. In the first place, extreme results, either in favor of or against the master's liability must be avoided. This, it is believed, sufficiently appears from the fact that for many years there has been a constant conflict among the members of the court itself in which both extremes were represented, and that the results actually reached will not justify either extreme. Almost ever since these master and servant tort cases have come before the Supreme Court there have been (until perhaps very recently) two pretty evenly balanced wings of opinion in the court,—one tending toward the extreme view of the English judges,[4]

[1] C. M. & St. P. Ry. *v.* Ross, 112 U. S. 377.

[2] B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368.

[3] 175 U. S. 326.

[4] "But what the master is in my opinion bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for their work. When he has done this he has, in my opinion, done all that he is bound to do." Lord Chancellor Cairns in Wilson *v.* Merry, 1 H. L. Sc. 329, 332; Wambaugh's Cases on Agency, p. 842, 845. In Smith *v.* Howard, 22 L. T. R. n. s. 130; the plaintiff, who attended a saw, was damaged

the other representing to an appreciable extent the opposite extreme. The first striking division of opinion in the court appeared in the *Ross case*,[1] and *N. P. & R. Co.* v. *Herbert*.[2] In both these cases Justice Field gave the opinion of the majority of the court in favor of the employer's liability. In both cases the majority of the court included Chief Justice Waite, and Justices Miller, Harlan, and Woods. The dissenting justices in both cases were Bradley, Matthews, Gray,[3] and Blatchford. In *Cunard Steamship Company* v. *Carey*,[4] and *C. & N. W. Ry. Co.* v. *McLaughlin*,[5] Mr. Justice Woods being absent, the court was evenly divided. Six years later, in *Price* v. *Detroit, G. H. & M. R. R. Co.*,[6] the court being again composed of eight judges, was evenly divided. The actual division of opinion is not given, but it is not difficult, from the opinions in previous and subsequent cases, to surmise that Chief Justice Fuller, and Justices Field, Harlan, and Lamar, were in favor of the employer's liability, while Justices Gray, Blatchford, Brewer and Brown,[7] were *contra*. Justice Shiras having taken his seat as a member of the court, and Justices Lamar and Blatchford having been succeeded by Justices Jackson and White, we find only the Chief Justice and Justices Field and Harlan for the more extreme view of the employer's liability.[8] A little later Justice Jackson having been succeeded by Justice Peckham, the division of opinion remained the same.[9] Still later, Justice Field having retired, we find only the Chief Justice and Justice

by the negligence of a boy employed to assist him. The boy was incompetent. The plaintiff had complained of him to the foreman in charge, who had promised to provide more efficient service. The plaintiff was non-suited, because it did not appear that the *foreman* who hired the boy, and whose business it was to hire employees, was incompetent. A rule for a new trial was discharged, the court consisting of Kelly C. B., Martin B., and Channell B."

[1] C. M. & St. P. Ry. *v.* Ross, 112 U. S. 377.

[2] 116 U. S. 642.

[3] Justice Gray in giving the opinion of the court in Alaska Mining Co. *v.* Whelan, 168 U.S. 86, cited Wilson *v.* Merry, *supra* page 79, Note 4. The opinion of Chief Justice Gray in Holden *v.* Fitchburg Railroad Co., 129 Mass. 268, repeats with approval the language of Lord Cairns in Wilson *v.* Merry, quoted *supra* page 79, Note 4. This fact is noted in New England Railroad Co. *v.* Conroy, 175 U. S. 323, at page 331.

[4] 119 U. S. 245.

[5] 119 U, S. 566.

[6] 145 U. S. 651; fully reported in 36 L. ed. 843.

[7] Mr. Justice Brown, sitting as district judge below, directed the verdict for the defendant.

[8] N. P. R. R. Co. *v.* Hambly, 154 U. S. 349. Central R. R. Co. *v.* Keegan, 160 U. S. 259.

[9] N. P. R. R. Co. *v.* Peterson, 162 U. S. 346.

Harlan dissenting in favor of the employer's liability.[1] Finally, Justice McKenna having succeeded to Justice Field's place, we find in *New England Railroad Co.* v. *Conroy*,[2] which seems to go furthest in overruling the *Ross case*,[3] only Justice Harlan dissenting in favor of the employer's liability.[4] It is quite apparent, then, that the temper of the court has, after many years of contest, become settled against the more extended view of the employer's liability. On the other hand, the results actually reached in cases which have been acquiesced in by all, or almost all, do not justify the conclusion that the more extreme view of some English judges,[5] against the employer's liability has prevailed.[6] In truth it is believed that in the years of contest, and the nice dividing of the cases, the disposition of the court has become fixed in favor of results lying somewhere between the extremes.

Passing now from the temper of the Supreme Court, it should be observed that the theory upon which the principle referred to must be drafted, may be regarded as well settled in favor of that which makes the whole question one of the scope of the master's legal duty toward his employees. This is a conclusion which can only be established by excluding with some care the other ideas upon which such a principle as is hinted at, might be based.

The master, it is usually said, is liable to strangers for the negligence of his servant, upon the principle of *respondeat superior*. In

---

[1] Alaska Mining Co. *v.* Whelan, 168 U. S. 86. [2] 175 U. S. 323.

[3] 112 U. S. 377.

[4] Since Justice Holmes and Justice Day succeeded to the places of Justice Gray and Justice Shiras, no fellow servant case has been passed upon by the court.

[5] *Supra* page 79, note 4.

[6] It seems to be the law in the United States Supreme Court that for any damage to a servant resulting from the neglect of the master in employing an incompetent co-servant, the master is liable. Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454; N. P. R. R. Co. *v.* Mares, 123 U. S. 710; B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368, 384-387 *semble*. Nor is it intimated that the master would in general be relieved from responsibility if he hired a competent employee to do the hiring in question. The Supreme Court has several times refused to go the length of the language of Wilson *v.* Merry, *supra* page 79, note 4. In Texas & Pac. Ry. Co. *v.* Barrett, 166 U. S. 617, 67 Fed. Rep. 214, the plaintiff, a fireman in charge of a switch engine, was hurt by the explosion of a locomotive boiler in another part of the yards. A refusal to instruct in substance, that If defendant originally furnished a reasonably safe engine and used reasonable care to furnish competent inspectors and used reasonable care to see that they did their duty, the defendant was not liable, was sustained. See also Mather *v.* Rillston, 156 U. S. 391, where the plaintiff, an engineer at a mine, was hurt by the explosion of powder negligently left in the engine house by the orders of a co-employee. Judgment for the plaintiff was sustained, though there was no evidence that the co-employee was incompetent.

the case where the master is not liable for the negligence of one co-employee toward another, there is an inclination to say that the rule of *respondeat superior* (doubtless on some ground of public policy) does not apply. Perhaps it is not very material, but it is believed it would be more accurate to say in this latter case that the doctrine of *respondeat superior* does apply so as to charge the master with the acts of his servant, but that (on grounds of public policy, no doubt), some rule of law intervenes to relieve the master of liability.

The earliest theory upon which the master's non-liability was rested by the Supreme Court, asserted that the servant *assumed the risk of the negligence of his co-employee.* More fully stated, the idea was this: the master owes the same duty to the servant that he does to any third party to use due care, and that he would, on the doctrine of *respondeat superior*, be liable in every case of damage to one employee by the negligence of a co-employee acting in the scope of his employment, were it not for the fact that the plaintiff, when he enters the employment, assumes the risk of his co-employee's negligence. Of course it was at once admitted that the servant did not assume every risk of the employment, so it still remained to be determined what risks were assumed and what were not. At first it was said that this depended upon the scope of the employee's contract with the employer.[1] Clearly, however, there was no contract expressed in words, or by necessary implication, governing the risks to be assumed. No real issue was ever made of the scope of the contract of employment. It is believed that the use of the implied contract referred to, is no more than an inartistic way of announcing the result of an absolute rule of law which makes the

---

[1] In U. P. R. R. *v.* Fort, 84 U. S. 553 at page 557 the whole ground of liability, or non-liability on the part of the master was expressed by Justice Davis in terms of assumed risk. " * * * The employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it," In Hough *v.* Texas & Pac. R. R., 100 U. S. 213, at page (213), Justice Harlan says, "It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct and capacity, he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest."

master liable for some acts of negligence of one co-employee toward another, and not liable for others. It is believed also that this reference to the scope of the contract of employment never obtained any real foothold in the Supreme Court. It seems never to have been followed out fully except in one ease,[1] and was only clearly expressed in one other.[2] Both of these were the first fellow servant cases in the United States Supreme Court.

In the *Ross case*,[3] the majority of the court seems to have abandoned the idea that the risk is assumed, or not, according to the scope of the contract of employment, and to have taken up a test based upon the *relation in the business of the negligent employee to the plaintiff*. There the majority of the court, by Justice Field, started with the assumed risk idea, and undertook to restrict the risks assumed to those of the negligence of a co-employee in the same common employment. In defining what was meant by common employment, the learned justice said:—

"There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence."

This language, coupled with the fact that the court did not reverse a judgment obtained upon instructions to the effect that "if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow servants engaged in the same employment," went far toward suggesting that the employer's liability rested upon the relation in the business between the plaintiff and the negligent co-employee.

This idea that the master's liability, or non-liability, is controlled by the relation of the negligent co-employee to the plaintiff has, it is believed, in its turn wholly disappeared from the United States Supreme Court, giving place to the conception that the *nature of the act about which the negligence occurred*, is the controlling feature. In the *Baugh case*[4] the court refused to approve an instruction to the jury in substantially the same terms as the instruction given in the *Ross case*. The particular rule announced by that

[1] U. P. R. R. Co. *v*, Fort, 84 U. S. 553 (Justice Davis).

[2] Hough *v*. Texas & Pac. R. R. Co., 100 U. S. 213 (Justice Harlan).

[3] C. M. & St. Paul Ry. *v*. Ross, 112 U. S. 377.

[4] B. & O. Railroad Co. *v*. Baugh, 149 U. S. 368.

instruction, as to the relation which one employee may bear to another without relieving the master from liability for the negligence of one toward the other, may therefore be regarded as disposed of. While the *Baugh case* did not wholly ignore [1] the possibility of the master being liable for the negligence of an employee in charge of one department toward the employee of another department, yet as time has passed such a rule has seemed to possess less and less force. In *N. P. R. R. Co.* v. *Hambly*,[2] and *Central R. R. Co.* v. *Keegan*,[3] it is suggested that whenever the different department rule seems to be applicable to make the master liable, the employer's liability is in reality predicated upon the breach of the master's legal duty towards his employees. In *N. P. R. R. Co.* v. *Peterson*,[4] the court merely considers whether the facts of the case bring it within any rule of employer's liability founded upon a separate department test (if there be one,) as distinct from the master's liability for the breach of his legal duty toward his servants, and finds that they do not. There are other considerations which strengthen the belief that the fact of the relation of the negligent co-employee and the plaintiff is irrelevant upon the question of the employer's liability. If the relation of the co-employee with the plaintiff is such as to make the employer liable for the negligence of the co-employee in one instance, it should make the employer liable no matter what the act may be, about which the co-employee is negligent. Yet, there is no point upon which the Supreme Court now seems clearer than that, in so far as the *Ross case* undertook to hold that a railroad corporation is always liable for the negligence of a conductor toward an engineer, it went too far.[5] To quite conclusively test the importance of the relation in the business of the negligent co-employee to the plaintiff, we should have a second case just like the *Ross case*, so far as the relation of the employees is concerned, but with an entirely different act about which the negligence occurs. Thus suppose the negligence of the conductor in the second case consist in failing to have brakemen stationed at the hand brakes, so

[1] 149 U. S. pp. 382-384.

[2] 154 U. S. 349 (Justice Brown).

[3] 160 U. S. 259 (Justice White).

[4] 162 U. S. 346 (Justice Peckham).

[5] "We think," says Justice Shiras, in giving the opinion of the court in New England Railroad Co. *v.* Conroy, 175 U. S. 323, at page 341, "it (the Ross Case) went too far in holding that a conductor of a freight train is *ipso facto* a vice principal of the company." See also the opinion of Justice Brewer in B. & O. Railroad Company v. Baugh, 149 U. S. 368, at page 382.

that upon the breaking in two of the train the rear end crashes down upon the front end, hurting the *engineer*. If in this latter case it were held that the master was not liable, we might well infer that the relation in the business between the plaintiff and the negligent co-employee was of no ultimate significance. Exactly such a case may not arise. We have, however, something very near to it in *New England Railroad Company* v. *Conroy*.[1] There a *brakeman* on the front end of a train was hurt by the negligence of the conductor in failing to have men stationed at the hand brakes to prevent the rear end from colliding with the front end after the train had broken in two. It was held that the master was not liable, and the opinion of the court, like that of the majority in the *Baugh case*, goes a long way toward negativing the attaching of any ultimate importance to the relation in the business between the plaintiff and the negligent co-employee. Finally, the language of the court indicates a conscious effort to dispose of the idea that the relation between the employees in the business is important, and instead to adopt the theory that it is the nature of the act about which the negligence occurs that is controlling. "Therefore," concludes Justice Brewer, in giving the opinion of the court in the *Baugh case*,[2] "it will be seen that the question [of the employer's liability] turns rather on the character of the act than on the relation of the employees to each other." This expression is quoted with approval in two subsequent cases.[3] In *Mather* v. *Rillston*,[4] the negligence of the co-employee consisted in not properly warning the engineer of a mine of the danger resulting from the storing of powder in the engine house. It is very significant that though the co-employee was the *manager* of the mine, and though Justice Field gave the opinion of the court, the liability of the master was rested wholly upon the *character of the act* about which the negligence occurred. Nothing was said concerning the relation between the employees. It should be noted, in conclusion, that the safe appliance and safe place test has always fixed the master's liability by reason of the character of the act in respect to which the negligence occurred, quite regardless of the relation of the employees to each other.

Observe now that when the rule of the employer's liability, which rested upon the *relation of the employees* to each other, gave

[1] 175 U. S. 323.

[2] B. & O. Railroad Co. *v.* Baugh, 149 U. S. 368, at page 387.

[3] U. P. Ry. Co. *v.* Daniels, 152 U. S. 684, 689 (the Chief Justice); New England Railroad Co. *v.* Conroy, 175 U. S. 323, 345 (Justice Shiras).

[4] 156 U. S. 391.

way to a rule founded upon the *nature of the act* in respect to which the negligence occurred, the idea that the master was not liable because the servant assumed certain risks, gave way to the more modern theory that the master was only liable when he was guilty of the breach of a personal duty toward the employee. The *Baugh case* marks the end of the idea that the relation of the employees is controlling, and the beginning of the rule which makes the character of the act about which the negligence occurs, all important. So it marks, though less distinctly, the end of the idea that the master is not liable because the servant assumes a risk, and the beginning of the idea that the master is liable only when guilty of a breach of duty toward his employees. Attention to the opinions of the Supreme Court in its fellow servant cases will show how the language of the court has passed from that of "assumed risk" to the idea of the "breach of a legal duty." In *U. P. . R. Co.* v. *Fort*,[1] perhaps the first fellow servant case in the Supreme Court, the whole ground of liability or non-liability on the part of the master was expressed by Justice Davis in terms of assumed risk.[2] In *Randall* v. *B. & O. R. R. Co.*,[3] the doctrine of assumed risk is stated by Justice Gray as if it covered the whole ground of the master's non-liability. In the *Ross Case*,[4] Justice Field puts forward the idea of assumed risk as a settled starting point. The only other opinion in the Supreme Court reports which seems to advert exclusively to the doctrine of assumed risk is the recent one of Justice Shiras in *N. P. R. R. Co.* v. *Poirier*.[5] On the other hand, beginning with *Hough* v. *Texas & Pac. R. R. Co.*,[6] in Volume 100 of the Supreme Court reports down to the present time there has been a steady line of opinions expressing the idea that the master's liability, or non-liability depends upon the scope of his legal duty toward his servants. Of these, those down to the *Baugh case*,[7] adopted both lines of expression.[8] The assumption of risk idea was used to indicate the master's non-liability, while the scope of the master's duty was emphasized in the cases where he was held liable. The *Baugh case*, while not wholly ignoring the language in regard to assumption of risk, contains such a complete exposition of

---

[1] 84 U. S. 553. [2] *Supra*, page 82, note 1. [3] 109 U. S. 478

[4] 112 U. S. 377. [5] 167 U. S, 48. [6] 100 U. S. 213. [7] 149 U. S. 368

[8] Hough *v.* Texas & Pac. R. R. Co., 100 U. S. 213 (Justice Harlan); Armour *v.* Hahn, 111 U. S. 313 (Justice Gray); N. P. R. R. Co. *v.* Herbert, 116 U. S. 642 (Justice Field); B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368 (Justice Brewer); U. P. Ry. Co. *v.* O'Brien, 161 U. S. 451 (the Chief Justice); New England R. R. Co. *v.* Conroy, 175 U. S. 323 (Justice Shiras).

the legal duty idea, and of what the master's legal duty consists, that ever since that case this idea has been plainly paramount in the court. Since the *Baugh case* there is only one opinion which dwells wholly upon the assumed risk idea.[1] There are but two which bring forward both ideas,[2] while in five the scope of the master's legal duty is alone referred to as controlling.[3] It is significant, also, that some language of the *Baugh case*, which seems not wholly to ignore the different department idea as fixing a test for the master's liability, has been explained in two later cases,[4] as meaning no more than that the master is liable if he is guilty of a breach of duty toward his employees.

Not only do the opinions of the court indicate the passing of the application of the doctrine of assumed risk, as a principle for determining the employer's liability, or non-liability, in the ordinary case where the plaintiff is hurt by the negligence of a co-employee, but it is believed that on principle it is high time this result was accomplished. If an employee knows of the incompetence of a co-employee, and makes no complaint, he assumes, it is said, the risk of that incompetence. The mere fact, also, of entering the same employment will, it is said, cause him to assume the risk of the negligent acts of the co-employee as a risk of the employment. But this must be qualified, for the employee does not assume the risk of all negligent acts by co-employees. If he is a switch-yard foreman, he does not assume the risk of the negligence of a locomotive boiler inspector in failing to inspect.[5] If he is an engineer at a mine, he does not assume the risk of the negligence of a co-employee in regard to the storing of powder used in blasting.[6] In the case where the employee has knowledge of the co-employee's incompetence, his personal conduct makes it proper that he should assume the risk; and observe that it logically follows that he assumes *all* the risks of that incompetence. If, therefore, the mere act of enter-

[1] N. P. R. R. Co. *v.* Poirier, 167 U. S. 48 (Justice Shiras).

[2] U. P. Ry. Co. *v.* O'Brien, 161 U. S. 451 (the Chief Justice); New England R. R. Co. *v.* Conroy, 175 U. S. 323 (Justice Shiras).

[3] Gardner *v.* M. C. R. R. Co., 150 U. S. 349 (the Chief Justice); N. P. R. R. Co. *v.* Babcock, 154 U. S. 190 (Justice White); Mather *v.* Rillston, 156 U. S. 391 (Justice Field); N. P. R. R. Co. *v.* Peterson, 162 U. S. 346 (Justice Peckham).

[4] N. P. R. R. Co. *v.* Hambly, 154 U. S. 349 (Justice Brown); Central R. R. Co. *v.* Keegan, 160 U. S. 259 (Justice White).

[5] Texas & Pac. Ry. Co. *v.* Barrett, 166 U. S. 617.

[6] Mather *v.* Rillston, 156 U. S. 391. For other examples where the plaintiff does not assume the risks of the negligence of a co-employee, see *infra*, pages 96, 97.

ing the employment of the master cause the employee to assume any risk at all, why does he not assume every risk of the employment, just as the employee who knows of the incompetence of the co-employee assumes all the risks of that incompetence? Upon what principle of assumed risks as such do you divide the risks of the employment into two classes—one of which the employee assumes, and the other of which he does not? To press the matter a little further: the master may be liable for the negligence of the servant in one respect and not in another. The railroad company may be liable if a master mechanic fails to remedy a defective cow-catcher,[1] but not if he drops a wrench upon the engineer's head. But upon the doctrine of assumption of risk, as such, why does not the plaintiff assume all risks of that particular employee's negligence, just as he assumes all the risks of incompetence which he knows of? In his opinion in *B. & O. R. R. Co.* v. *Baugh*,[2] Justice Brewer seems to have recognized this difficulty with the use of the doctrine of assumed risk. "But if," he says, "the fact that the risk is or is not obvious, does not control, what test or rule is there which determines?" Then he goes on to suggest that the whole matter ought to be approached from the point of view of the master's legal duty. He answers the question just quoted, as follows:—

"Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty upon his part. * * * * It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master?"

The whole exposition, of which this is but a part, contains the most complete statement to be found in the United States Supreme Court reports of the view that the master's liability, or non-liability, depends upon whether he has committed the breach of a legal duty or not, and the scope of that legal duty. It is noticeable, as has just been pointed out, that since the *Baugh case* the opinions of the other justices tend to adopt this as a starting point rather than the assumed risk idea.[3]

---

[1] Hough *v.* Texas & Pac. R. R. Co., 100 U. S. 213.

[2] 149 U. S. 368 at page 384.

[3] Sometimes the legal duty of the master to the servant is spoken of as if founded upon a contract. Thus, in Hough *v.* Texas & Pac. R. R. Co., 100 U. S. 213, at page 217, Justice Harlan, after speaking of an implied contract between master and servant, that the latter

We may then conclude that any formula which attempts to fix the liability of the master, must be shaped so as to define *the legal duty* of the master toward his employees, and the description of the circumstances under which such a duty arises, must have reference to the *nature of the act* in respect to which the co-employee's negligence occurs. The large outlines of a formula being thus settled, it remains only to select such expressions as will reconcile the results of the cases.

It is believed that the Supreme Court has never committed itself to any final and complete formula describing the extent of the employer's duty. Indeed, it is difficult to see how it could have done so, while its members were so evenly and so radically divided in opinion. Perhaps the most often repeated test is that which declares it to be the personal duty of the master to use due care to furnish reasonably safe appliances, and a reasonably safe place to work.[1] But even this test (valuable as it is, and doubtless correct so far as it goes,) will hardly prove on analysis to be entirely satisfactory as a final formula. The safe place, and safe appliance test, to be a final formula, must be a complete description of the duty of the master to his servant. It is not enough that the test be good so far as it goes. It must cover the whole ground. It must be such a description of an ultimate fact, as can with propriety be made the basis of allegations and instructions to the jury in every case where an employee sues the master on account of the negligence of a co-employee. These requirements it certainly does not fill. The three cases arising between the *Ross case* and the *Baugh case*, where the Supreme Court was evenly divided, indicate that the safe appliance and safe place test was not regarded as a complete description of the master's duty toward his servant. In *Cunard Steamship Co.* v. *Carey*,[2] the question arose as to the liability of a master for

---

assumes certain risks, says: "But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care." See also B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368, at page 386; and Gardner *v* M. C. R. R. Co., 150 U, S. 349, at page 360. Of course, such expressions, even if referring to a real contract, are not relevant in an action sounding in tort. The duty, for the breach of which these actions of tort are brought, must be a legal duty other than that arising out of contract.

[1] The opinion of Justice Brewer in B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368, 384-387, contains the most complete statement of this rule. See also the cases mentioned *infra* pages 96, 97.

[2] 119 U. S. 245.

the negligence of a co-employee of the plaintiff in using a worn rope to hoist coal tubs out of the holds of vessels. A judgment for the plaintiff was affirmed by a divided court. In *C. N. W. Ry. Co.* v. *McLaughlin*,[1] the plaintiff, a car repairer, was injured while in the discharge of his duties as such, by the negligence of an engineer, or switchman, in backing down upon the car upon which the plaintiff was at work. The court was again evenly divided. In *Price* v. *Detroit, G. H. & M. Co.*,[2] the plaintiff, a locomotive engineer, was injured through the negligence of a telegraph operator, in failing to deliver a message from the train dispatcher, and a judgment for the defendant was affirmed by a divided court. If in these three cases the upper court had been agreed that the safe place and safe appliance test was a complete description of the master's duty to his servants, they must have disagreed as to the application of the test to the evidence. But such a function is for the jury, and what more appropriate case for a jury than that where eight judges were evenly divided as to the effect of the evidence. In truth, the only point upon which the Supreme Court might properly differ was the scope of the test to be applied. We are thus driven to the conclusion that during this period between the *Ross case* and the *Baugh case*, the court was not really agreed upon the scope of the employer's liability, as indicated by the safe appliance and safe place test. It was, therefore, impossible to put forward this test as a final and complete description of the duty of the master toward his servant.

Since the *Baugh case*, the indications that the safe appliance and safe place test is not a final one, are even more marked. There are at least two decisions since the *Baugh case* where the safe place and safe appliance test had no application, and where, nevertheless, a verdict for the plaintiff was sustained without dissent. This will more clearly appear if we contrast *Martin* v. *Atch., T. & Santa Fe R. R. Co.*,[3] with *Texas & Pac. Ry. Co.* v. *Barrett*,[4] both in the 166th Volume of the Supreme Court reports. The first decision represents the usual case where judgment should have been directed for the defendant, and the safe place test had no application. In the second case, though it is believed to be indistinguishable from the first, so far as the application of the safe place test is concerned, a recovery by the plaintiff was nevertheless permitted. In *Martin* v. *Atch. T. & Santa Fe R. R. Co.*, the plaintiff, a section hand on

---

[1] 119 U. S. 566.

[2] 145 U. S. 651, 36 L. ed. 843.

[3] 166 U. S. 399.

[4] 166 U. S. 617, 67 Fed. Rep. 214.

a hand car, was hurt because of the failure of the section foreman on the car to keep a look out for a train which was backing down upon them. Counsel argued in the Supreme Court that the plaintiff was hurt because of the neglect of the master to furnish a safe place for the servant to perform his work in. The court, in sustaining a reversal of judgment for the plaintiff, said:—

"We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence nor is any claim made that the hand car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit in and of itself, from the station of Alberquerque to the point where the plaintiff was going to work. * * If the car was rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south."

In *Texas & Pacific Ry. Co.* v. *Barrett*, the plaintiff, a foreman in charge of a switch engine operating in the defendant railroad's freight yards, was hurt by the explosion of a locomotive boiler which had been placed by the foreman of the roundhouse on a track in the yard, with steam up, to take out a train. Evidence that the boiler was in a defective condition, owing to the negligence of the defendant, was left to the jury. The court refused to instruct that if "the defendant originally provided a reasonably safe engine, and * * * used reasonable care to employ a competent inspector to keep said engine in repair, and * * * used reasonable supervision to see that such inspector performed his duty," the defendant was not liable.[1] Judgment for the plaintiff was affirmed. What possible difference can be suggested between these two cases as regards the safe place test? In the first case the place was clearly made unsafe. The same is true of the second case, for though the boiler may have been a defective appliance as regards the engineer of the locomotive which blew up, yet as regards a switch-yard foreman on another engine in another part of the yards, the defective boiler was simply an element conducing to make unsafe the place where the plaintiff worked. Nor will the distinction sometimes taken between furnishing an unsafe place and furnishing a safe place which afterwards becomes unsafe through the negligence of a fellow servant avail much here, because in both cases the place seems to have been safe enough to begin with and was only made unsafe

[1] See report of this case, 67 Fed. Rep. 214.

by the negligence of a fellow servant. In the first case the fellow servant was the foreman on the hand car—in the second case the boiler inspector. In the first case the negligence of the co-servant occurred at the time of the accident. But it is not perceived that the result in the second case would have been different if the negligence of the boiler inspector had occurred sixty seconds before the boiler blew up. Nor is any distinction perceived to exist in the mode in which the place became unsafe in the two cases. What difference is there between acting as a back stop for the piece of a bolearin d stopping a whole train of cars? Nevertheless in the first case the master was held to have performed his whole duty toward the plaintiff when he furnished a competent foreman while in the second case the court sustained a refusal to charge that the master was exonerated if he furnished competent boiler inspectors, and used due care to see that they did their duty. *Texas & Pac. Ry. Co.* v. *Barrett* must therefore stand for the proposition that there is upon the master a legal duty toward the servant which is not described or included in the safe place and safe appliance test. *Mather* v. *Rillston*[1] reinforces this conclusion. There the plaintiff, an engineer at a mine, was hurt by the explosion of powder negligently left in the engine house by the orders of a co-employee.[2] A judgment for the plaintiff was affirmed. On the other hand in *New England Railroad Co.* v. *Conroy*[3] where the plaintiff's intestate, a brakeman on the front half of a train which had broken in two, was killed by reason of the collision of the rear with the front section which resulted from the negligence of the conductor in not using due care to have brakemen on the top of the cars where they could apply the hand brakes, the Supreme Court held that upon the facts as certified by the Circuit Court of Appeals there could be no recovery by the plaintiff. What difference is there between these two cases upon the safe place test? In neither case was there any negligence in failing to furnish a safe structure for the plaintiff. In both cases the place, safe enough to start with, became unsafe through the negligence of a fellow servant. And yet in one the plaintiff was

[1] 156 U. S. 391.

[2] The powder was actually placed in the engine house by the orders of the general manager of the mine. The opinion of the court however, though given by Justice Field, did not hint that the judgment for the plaintiff could stand because the negligence was that of a superior servant. This is significant because it was Justice Field's opinion in the Ross case which gave credit to that idea for a time.

[3] 175 U. S. 323.

permitted to recover and in the other he was not. *Mather* v. *Rillston* certainly points to a principle of liability on the part of the master out side of and beyond the usual safe place test.

Both pairs of cases above contrasted are obviously enough correctly decided. They can not however be reconciled if the safe place and safe appliance test be regarded as a complete and final formula describing the whole duty of the master toward his employees. The difficulty with the safe place test is that it covers either too little or too much. If you restrict it to mean that the master need only use due care to make the place reasonably safe from the point of view of *structural conditions*, it covers too little. It you take the test literally, it covers too much, because an employee can hardly be hurt unless the place becomes unsafe. Somewhere between these two extremes there lies a principle of liability which seems to be unexpressed by the Supreme Court. Up to the present date, the application of this principle—if a principle which is wholly unexpressed can be said to be applied—seems to have consisted in the use of a nice judicial instinct,—a temper,—a disposition,—a mental leaning,—a personal feeling,—all of which is approximately summed up by the expression—a guess. In short a principle of law upon which important individual rights rest and which the United States Courts are constantly called upon to apply is so far unexpressed [1] that it can not be said to have reached the stage of being in doubt.

It is a pity that so important a principle should be left so vague. It is a pity that the rights of individuals in this regard should be left to the mercies of an unexpressed feeling that a single judge or set of judges may have. The interests of employers and employees alike demand that such a principle be expressed. They are entitled to the enunciation of a formula at least as definite as the formula defining negligence—a formula sufficiently comprehensive to describe the whole duty of the master toward the servant—a formula which may be made the basis of allegations in a declaration, and instructions to the jury, and in support of which evidence may be introduced, and upon the application of which to the evidence the jury may pass. A test is, therefore, suggested which it is believed is supported by the actual decisions of the cases, satisfies the pres-

[1] Note the following instances where the Supreme Court has declined to attempt to formulate any general rule: Hough *v.* Texas & Pac. R. R. Co. 100 U. S. 216, at page 216; Randall *v.* B. & O. R. R. Co. 109 U. S 478, 483; C. M. & St. P. Ry. *v.* Ross 112 U. S. 377, 389; New England Railroad Co. *v.* Conroy, 175 U. S. 323, 340.

ent temper of the court, is as definite as the formula defining negligence, and comprehensive enough to be made the basis of allegations and instructions to the jury and the subject of proof. It is this:—It is the duty of a master to his servant to use due care (i.e. the care which a reasonably prudent man under the circumstances would use) to provide all PERMANENT CONDITIONS OF SAFETY for such servants. Whenever, therefore, the negligence of a fellow servant occurs in respect to an act done in discharge of this duty of the master to provide a permanent condition of safety, there is a violation of the master's duty and he is liable. On the other hand whenever the negligence of a fellow servant occurs in respect to an act not done in discharge of this duty to provide a permanent condition of safety, but which is, let us say by way of distinction, MERELY INCIDENTALLY NECESSARY to safety, the master violates no legal duty toward the servant and consequently is not liable.

The formula proposed points out the clear distinction between the case where the foreman on the hand car failed to keep a look out [1] and the boiler explosion case.[2] Safe locomotive boilers are certainly a permanent condition of safety to railroad employees in general. The act of inspecting the boilers is equally a condition of safety to employees. Is it difficult to add the adjective permanent? The inspecting is an act of a permanent nature. It is not performed at odd times and places as an emergency or occasion arises but regularly according to a fixed and permanent plan. On the other hand the act of the section foreman on the hand car in looking out for an approaching train, while clearly necessary to the safety of other employees, was under the circumstances only incidentally necessary to their safety. It was an act called for under special circumstances as the necessity for it might arise. The test proposed announces with equal clearness the distinction between the case where the conductor negligently failed to have brakemen where they could set the hand brakes when the train broke in two[3] and the powder explosion case.[4] In the former case the act of the conductor while clearly necessary to the safety of the other employees was obviously only incidentally necessary to their safety. On the other hand it is as clearly a permanent condition of safety to mine employees that high explosives, necessarily used in the business of

[1] Martin *v.* Atch. T. & S. F. R. R. Co., 166 U. S. 399.

[2] Texas & Pac. Ry, Co. *v.* Barrett, 166 U. S. 617.

[3] New England Railroad Co. *v.* Conroy, 175 U. S. 323.

[4] Mather *v.* Rillston, 156 U. S. 391.

mining, should be carefully stored, as that locomotive boilers, necessarily used under high pressure of steam in the railroad business, should be carefully inspected.[1]

Examine the remaining general run of fellow servant cases in the United States Supreme Court and it will be found that they divide very neatly according to the test proposed. Take the cases where it was held that a verdict was properly directed for the defendant or that it should have been so directed, and it will be found that the act in respect to which the negligence of the co-employee occurred was merely incidentally necessary to the plaintiff's safety. The following are the acts of negligence in these cases:—An engineer negligently ran too fast while making a switch so that a switchman was hurt;[2] the plaintiff stepped upon the end of a beam negligently left projecting beyond a building in course of construction without being secured;[3] a foreman was careless in his commands regarding the lifting of a rail;[4] a ship's carpenter and porter neglected to secure a gangway rail after the departure of passengers;[5] the plaintiff, a helper building a culvert, was struck by a locomotive through the carelessness of the engineer;[6] a switchman who caught his foot in a frog was injured because of the negligence of the foreman in failing to have another employee stationed on the moving cars;[7] the foreman on a front hand car put on brakes so suddenly that the

---

[1] It is worth noticing that the facts in Mather *v.* Rillston, 156 U. S. 391 which showed that care in the act of storing the powder was a permanent condition of safety to employees was duly set up in the pleadiag filed by the plaintiff and proved at the trial. The inducement of the petition sets up with great minuteness the facts which give rise to the duty on the part of the defendant to use due care. It relates that the business of mining requires the sinking of shafts and removing of rock, that in doing this the use of explosives is necessary. The nature of the explosives used is then described. The necessity of thawing it and its liability to explosion when thawed is set out. Then follows a detailed description of the premises where the accident occurred, revealing the presence of machinery, engines and the fact that the place was subject to great heat and jarring—and that on the day of the explosion this place was filled with dynamite. The fact is then set up that the plaintiff was an engineer in charge of the engines on these premises and was ignorant that the dynamite was likely to explode. The fact of the explosion is then alleged and that it was caused by the defendant's neglect in storing the powder in the engine house without informing the plaintiff of the increased danger. All these facts alleged seem to have been sustained by proof.

[2] Randall *v.* B. & O. R. R. Co., 109 U. S. 478.

[3] Armour *v.* Hahn, 111 U. S. 313.

[4] Coyne *v.* Union Pac. Ry. Co., 133 U. S. 370.

[5] Quebec Steamship Co. *v.* Merchant, 133 U. S. 375.

[6] N. P. R. R. Co. *v.* Hambly, 154 U. S. 349.

[7] Central R. R. Co. *v.* Keegan, 160 U. S. 259.

rear hand car collided with the car in front;[1] the employees on an approaching freight train failed to signal men on a hand car and the foreman on the hand car ran at too high a rate of speed;[2] the conductor on a train ahead left a switch open so that the engineer of the train behind was hurt;[3] the engineer on a second train followed the first train too closely;[4] while the plaintiff was at work over a chute breaking rock, the foreman caused the door of the chute to be opened.[5] On the other hand look at the cases where a judgment for the plaintiff has been sustained or where the case should have gone to the jury,and it will be found that the act in respect to which the negligence occurred was a permanent condition of safety to the master's employees.[6] The cases of so-called defective appliances are most clearly of this class. There may be found in the United States Supreme Court reports the case of a defective cow-catcher,[7] of a defective brake,[8] of a defective ladder,[9] of a defective machine, [10] of a defective car wheel,[11] and of a defective snow plow.[12] In the cases where the plaintiff was damaged because of the defective condition of a railroad track,[13] the act in respect to which the fellow servant's negligence occurred was equally a permanent condition of safety of the master's employees. So also, where by the negligence of a co-employee of the plaintiff other incompetent co-employees of the plaintiff are hired[14] there may be a distinct

[1] N. P. R. R. Co. *v.* Peterson, 162 U. S. 346.

[2] N. P. R. R. Co. *v.* Charless, 162 U. S. 359.

[3] Oakes *v.* Mase, 165 U. S. 363.

[4] N. P. R. R. Co. *v.* Poirier, 167 U. S. 48.

[5] Alaska Mining Co. *v,* Whelan, 168 U. S. 86.

[6] Perhaps this is not true of what seems to be the first fellow servant case which came up to the Supreme Court, — U. P. Ry. Co. *v.* Fort, 84 U. S. 553. There the negligence of the fellow servant consisted in sending the plaintiff, a minor, into a dangerous place—viz.: at the top of a ladder to fix some belting on machinery. Judgment for the plaintiff was affirmed, Justice Bradley dissenting. Perhaps the result of this case goes farther than the test proposed would permit. Considering, however, later developments of the doctrine of the Supreme Court this is rather favorable than otherwise to the test proposed.

[7] Hough *v.* Texas & Pac. R. R. Co., 100 U. S. 213.

[8] N. P. R. R. Co. *v.* Herbert, 116 U. S. 642.

[9] Kane *v.* Northern Central Ry. Co., 128 U. S. 91.

[10] Washington & Georgetown R. R. Co. *v.* McDade, 135 U. S. 554.

[11] St. Louis,San Francisco Ry. Co. *v.* Schumacher, 152 U. S. 77.

[12] Northern Pac. R. R. Co. *v.* Babcock, 154 U. S. 190.

[13] In Texas & Pac. Ry. *v.* Cox, 145 U. S. 593 and Gardner *v.* M. C. R. R. Co., 150 U. S. 349 a switchman was hurt owing to the defective condition of the track. In U. P. Ry. Co. *v.* O'Brien, 161 U. S. 451, an engineer was killed by the derailment of a train.

[14] Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454; N. P. R. R. Co. *v.* Mares, 123 U. S. 710; B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368, 384-387 (*semble*).

failure in the performance of an act which is a permanent condition of safety to the plaintiff. The Supreme Court in holding the plaintiff entitled to recover has, however, in at least two cases already dealt with gone beyond the cases where the plaintiff was hurt because of negligence in employing an incompetent servant or because of some defect in a structure or appliance. In *Mather* v. *Rillston*[1] the plaintiff, an engineer at a mine, was hurt by the explosion of powder negligently left by the orders of a co-employee in the engine house. In *Texas & Pac. Ry. Co.* v. *Barrett*[2] a foreman in charge of a switching engine operating in the defendant railroad's freight yards was hurt by the explosion of a locomotive boiler sent out in a defective condition owing to the negligence of a boiler inspector. In both cases a judgment for the plaintiff was sustained. In neither of these cases was there any defect in any structure or appliance. In both cases a perfectly safe place was made unsafe by the negligence of a fellow servant. The court must, therefore, have gone beyond the safe place test and relied solely upon the character of the act in respect to which the negligence occurred. The phrase which it is believed best characterizes this act is "permanent condition of safety."

Consider the two cases in the 119th volume of the Supreme Court reports where the court was evenly divided and it will be found that they are close because upon the evidence it is difficult to say whether the act in respect to which the negligence occurred was a permanent condition of safety or only incidentally necessary to safety. The court, not being agreed upon the safe place and safe appliance test as a final and complete description of the master's duty toward his servant, and not being agreed upon any other formula, were unable to leave any question to the jury. Naturally they were driven to decide the case upon the legal effect of the evidence and they may well have differed in substance upon the real nature of the act of the negligent co-servant. Thus in *Cunard Steamship Co.* v. *Carey*[3] the plaintiff was hurt because of the failure of a co-employee to replace or repair a worn rope used to hoist coal tubs. Was the act of repairing or replacing this rope a permanent condition of safety? It may or may not have been, according as the evidence differed. If the act of repairing or replacing that rope were such that it became, like the act of inspecting boilers or storing powder used in mines, a permanent condition of safety then the master should be

[1] 156 U. S. 391. [2] 166 U. S. 617; 67 Fed. Rep. 214. [3] 119 U. S. 245.

liable. If on the other hand the repairing or replacing of the rope were merely incidentally necessary to the employee's safety,—if it were an act which is performed as each single emergency arises,—then the master would not be liable. The same remarks apply to *C. & N. W. Ry. Co.* v. *McLaughlin*.[1] There the plaintiff, a car repairer, was injured while in the discharge of his duties as such by the negligence of an engineer or switchman in backing down upon the car upon which the plaintiff was at work. If the railroad had maintained a large number of repair tracks at this place upon which damaged cars were constantly being overhauled by men whose ordinary duties brought them into positions of very great danger should any movement of the cars about which they were working take place, it is not impossible that it might become a permanent condition of safety to such repairers that warning be given them before any switching be done upon the tracks where they might be operating. On the other hand a case may be imagined where a switching track is temporarily used to accommodate a car in need of repairs and where it is only incidentally necessary to the safety of the repairer that switching crews use due care in backing down on that track.

Finally the test which has been suggested will it is believed come very near reconciling the result reached in the *Ross case*[2] with the actual decision in the *Baugh case*[3] and *New England Railroad Co.* v. *Conroy*.[4] The *Ross case* permitted an engineer to recover upon the negligence of the train conductor in failing to deliver to him a telegraph message from the train dispatcher in consequence of which a collision occurred. The *Baugh case* refused to permit a recovery by a fireman on a wild engine for the negligence of the engineer in failing to take proper precautions when running back after helping a train out, in consequence of which a collision occurred. In this case the court undertook to distinguish the *Ross case*. In *New England Railroad Co.* v. *Conroy* it was held, as we have seen, that the brakeman on the front end of a train which had broken in two could not recover upon the negligence of the conductor upon the rear end in failing to station brakeman at the hand brakes. The opinion in this case goes far toward justifying the general impression that the *Ross case* is now overruled. While there is much in

[1] 119 U. S. 566.

[2] C. M. & St. P. Ry. *v.* Ross, 112 U. S. 377.

[3] B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368.

[4] 175 U. S. 326.

the opinion of the court in the *Ross case* which must now be regarded as superseded,[1] yet the conclusion that the result of the *Ross case* can not be defended is, it is believed, not wholly necessary. The *Ross case* may be supported upon the ground that the act in respect to which the conductor's negligence occurred was a permanent condition of safety to employees engaged in operating trains. What could be more necessary in operating a railroad than that two trains should not rush toward each other on the same track at the same time? Is not the proper ordering and dispatching of trains, then, an absolute condition of safety to those operating trains? Is it not also a *permanent* condition of safety? Is not provision made for its accurate and regular performance at all times? Who would undertake to say that if the train dispatcher's own negligence in giving a wrong order has caused the collision the railroad would not be held? Is not train dispatching as much a permanent condition of safety as inspecting locomotive boilers? The train dispatcher is certainly a fellow servant of the men engaged in running the trains, but the railroad is liable because it owes a personal duty to its employees to use due care in the train dispatching. The negligence of employees to whom this service is delegated is therefore a breach of this duty. The boiler inspector may act under the master mechanic, but this will not make the negligence of the boiler inspector any less a breach of the master's duty. So in the *Ross case* the fact that the conductor was merely one of several agents to whom the master's duty to use due care in train dispatching was delegated does not make his neglect any less a breach of the duty of the master. The plaintiff therefore was properly permitted to recover.[2] On the other hand in the *Baugh case* the taking of proper precautions by the engineer was pretty clearly merely incidentally necessary to the plaintiff's safety. They were not precautions carried out according to a permanent plan, but were left to be used as the circumstances of a particular emergency might require. So in *New England Railroad Co.* v. *Conroy*, even more clearly, the

[1] See *supra* pages 83-88.

[2] The real difficulty with the Ross case was acutely pointed out in New England Railroad Co. *v.* Conroy, 175 U. S. 323 at page 341, 342. It is this:—All the facts which show that the conductor's act of delivering messages of this kind was a permanent condition of safety to employees on the railroad were assumed by the court. They were not alleged and proved as in Mather *v.* Rillston, *supra* p. 95, note 1. It is one thing however to disagree with the case because the court noticed in this manner facts not in the record, and quite another to state that assuming such facts to be properly before the court, the case is wrong on the doctrine of employer's liability.

act of the conductor in placing brakemen at the hand brakes on the rear end of the train which had broken in two was only incidentally necessary to the plaintiff's safety. It was an act called for in a particular emergency. The doing of this act was not a permanent condition of safety to employees engaged in the business of railroading.

Of all the fellow servant cases in the United State Supreme Court there is only one which in any way tends to cast doubt upon the principle suggested. In *Price* v. *Detroit, G. H. & M. Ry. Co.*[1] the act in respect to which the negligence occurred was substantially the same as that in the *Ross case*. The plaintiff's intestate, a locomotive engineer, was killed in a collision resulting from the negligence of a station telegraph operator in failing to deliver a message from the train dispatcher to the conductor. What has just been said in support of the *Ross case* is applicable here. In both cases the negligence occurred in respect to an act which is a permanent condition of safety to employees. Nevertheless in *Price* v. *Detroit, G. H. & M. Ry. Co.* a verdict for the defendant was directed and this was affirmed by an evenly divided court. It will doubtless be claimed that if the court was evenly divided at this time a majority might now well be against the employer's liability in such a case. Yet a delicate examination of the matter will, it is believed, lead to a different conclusion. When *Price* v. *Detroit G. H. & M. Ry. Co.* was decided there was strong in the court a reaction against the *Ross case*. This reaction at that time was perhaps no more than a protest against the mode in which a test based upon the relation in the business of the negligent employee and the plaintiff was applied. Some members of the court seem to have desired that it be administered so as to extend the employer's liability. This view prevailed in the *Ross case*. Other members of the court were strongly opposed to the extension of the employer's liability. The three cases between the *Ross case* and the *Baugh case* where the court was evenly divided,[2] indicate how firmly this opposition was maintained. Finally in the *Baugh case* the majority of the court for the first time registered its disapproval of what had been all along felt by at least four members of the court to be the unwarrantable wholesale extension of the employer's liability in the *Ross case*. The

---

[1] 145 U. S. 651, fully reported in 36 L. ed. 843.

[2] Cunard Steamship Co. *v.* Carey, 119 U. S. 245; C. & N. W. Ry. *v.* McLaughlin, 119 U. S. 566; Price *v.* Detroit, G. H. & M. Co., 145 U. S. 651, 36 L. ed. 843.

opinion of the court in the recent case of *New England Railroad Co.* v. *Conroy*[1] registers the same disapproval. If then the decision in *Price* v. *Detroit, G. H. & M. Ry. Co.* depended solely upon a principle resting upon the relation in the business of the negligent co-employee and the plaintiff and the application of it according to the *Ross case*, the plaintiff would undoubtedly fail at the present day. The *Baugh case*, however, not only registered the disapproval by the majority of the court of the reasoning of the *Ross case* but it put forward with considerable elaborateness a new principle upon which the employer's liability was destined to be rested. It was there, by Justice Brewer, for the first time in the Supreme Court suggested that the employer's liability turned rather upon the "character of the act" than on the "relation of the employees to each other."[2] This idea has, as we have seen, gained steadily at the expense of the idea of the *Ross case* that the relation of the employees to each other is the controlling element. Finally in the more recent cases of *Mather* v. *Rillston*,[3] and *Texas & Pac. Ry. Co.* v. *Barrett*,[4] we find the employer's liability actually being extended beyond the usual safe place test upon the principle that the nature of the act about which the negligence occurs is to govern. In *Price* v. *Detroit, G. H. & M. Ry. Co.* the plaintiff's case was rested wholly upon the reasoning of the *Ross case* and not in any way upon the coming principle by which the master's liability turned upon the nature of the act in respect to which the negligence occurred. The result was, therefore, the natural product of a time when a perfectly justified reaction against the reasoning of the Ross case was strong, and when the principle upon which the actual decision of the *Ross case* may be supported had neither been expressed nor acted upon. It is not at all clear that the same conclusion would be reached in a similar case arising at a time when it has become pretty well settled that the nature of the act about which the negligence occurs is the chief element in fixing the master's liability and when the court has already in two cases extended the employer's liability upon this line. What possible distinction could be drawn between *Texas & Pac. Ry. Co.* v. *Barrett* where a locomotive boiler inspector was negligent in failing to inspect and a case where a telegraph operator was negligent in failing to deliver

[1] 175 U. S. 323.

[2] B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368 at p. 387.

[3] 156 U. S. 391.

[4] 166 U. S. 617; 67 Fed. Rep 214.

a message from the train dispatcher? In both we have the negligence of fellow servants. In both the fellow servants act under superiors in the same way. In each case, however, the act about which the negligence occurs is, it is submitted, of the same nature, viz: a permanent condition of safety to employees.

It will undoubtedly be objected that after all the proposed test does not help matters much; that it is just as difficult as before to tell whether or not the master is liable. Cases will be put and it will be asked: Is the act here in discharge of a duty to provide a permanent condition of safety or is it merely incidental to safety? Because there may be doubt or room for argument on both sides it will be said that the proposed test has failed. This sort of objection cannot be countenanced. It gains whatever force it seems to have from an erroneous assumption of the scope of the test proposed. It not only fails to perceive the limits of what has been attempted, but it attributes an absurd and impossible function to the test offered. The objection assumes that the test proposed is exploited as a mathematical rule by which any claim agent may tell at a glance whether the evidence shows a liability on the part of the master or not. This is not only an erroneous assumption, but its futility becomes quite apparent when it is perceived that such an effect is *impossible*. The only possible function for such a formula as has been suggested is to describe an ultimate fact, the existence of which imposes a liability. It is the function of the ordinary processes of reasoning to discover from the evidence whether such an ultimate fact exists. Hence the absurdity of attributing to the formula which describes the ultimate fact the magical power of performing the reasoning process of the human mind, and that, too, with more absolute precision than the human mind itself is capable of.

Finally those who object to the test proposed on the ground of its inutility are evidently not aware of the advantage of such a formula in the actual work of conducting a close case. The difficult cases in the United States courts at the present time are those like *Mather* v. *Rillston*[1] and *Texas & Pac. Ry. Co.* v. *Barrett*[2] where there is no defective appliance and where the place is not made unsafe because of any defective structure. It is impossible to apply the usual "safe place" test here. If therefore the declaration be drawn in the usual form and the proof merely shows that

[1] 156 U. S. 391; *supra* pp. 92-93.

[2] 166 U. S. 617; 67 Fed. Rep. 214; *supra* pp. 90-93.

the accident occurred because of the negligence of a co-employee in doing or omitting to do some act whereby the place where the plaintiff was working became unsafe, there is little hope for the plaintiff—at least in the district with which the writer is familiar. On the other hand if the inducement of the declaration alleges the fact that the act in question about which the negligence of the co-employee occurs is a permanent condition of safety to the plaintiff, or perhaps better yet, if the declaration sets up the facts which show that to be the case, and if proof be introduced to sustain these allegations (as was evidently done in *Mather* v. *Rillston*) a point and direction is given to the case which otherwise must be lost. The value of presenting a fellow servant case upon these lines in the United States Supreme Court must be considerable even though the test proposed be not entirely accepted. If the description of the ultimate fact suggested be accepted then there is the sound basis for an instruction to the jury, and counsel and jury alike will have an opportunity of performing that necessary process of reasoning to determine whether the evidence produces the ultimate fact described. All this cannot but be a great gain to the plaintiff's case over the present usual method of showing damage to the plaintiff by the negligence of a fellow servant and producing only such evidence as to the nature of the act about which the negligence occurred as happens to come out incidentally.

But still it may be objected that the phrasing of the proposed test is ambiguous. What is meant by "permanent" and what by "incidental?" One might as well ask what is meant by "an ordinary reasonable man" or "due care." All you can say of "care which an ordinary reasonable man would use under the circumstances" is that the language of the formula is composed of words in common use and that the idea is one which a jury can easily grasp. All this is true of the distinction between acts which are a permanent condition of safety for employees and those which are only incidentally necessary for their safety. The very notion of an ultimate fact is that an end of defining has come. You may dissect and analyze for the purposes of argument and exposition. For this purpose also one may consult the dictionary for synonyms, but all this works no change in the form of the description of the ultimate fact. Eventually it is for the tribunal upon which rests the responsibility of deciding whether the ultimate fact has been proved, to declare its opinion upon all the evidence. To contend, therefore, that the phrase "all permanent conditions of safety" describes an

ultimate fact is to assert that so far as the rule of law is concerned there shall be no more defining.

Perhaps it will be urged that if the test proposed be adopted then in every action in tort by a servant against his master for damages resulting from the negligence of a co-employee, there will be two questions of fact to be decided: First, was the act in respect to which the negligence is alleged to have occurred a permanent condition of safety to employees? Second, was the co-employee guilty of negligence? In consequence it will be urged, all these fellow servant cases in the United States courts will be taken out of the hands of the court and placed in the hands of the jury, to the great detriment of defendants. To this it may be replied that, so far as the control of the jury is concerned, the court will exercise the same function in the case where the question is whether the act in respect to which the negligence occurred is a permanent condition of safety or not, as where it is one of negligence pure and simple. If this is not sufficient protection for defendants,—if the court must go farther than this—then by all means let it be the trial court's function to decide whether the act in respect to which the negligence occurred is a permanent condition of safety or only incidentally necessary to safety, just as it does whether the fact of "reasonable and probable cause" exists in cases of malicious prosecution. At all hazards let us have a formula describing an ultimate fact which when proved will impose upon employers a legal duty to personally see to the performance of the act in respect to which the negligence of the fellow servant occurred.

It has been pointed out that in attempting any general principle which shall govern the extent of the employer's liability in these fellow servant cases in the United States Supreme Court extreme results must be avoided.[1] It has been indicated that such a principle must be drafted so as to describe the *legal duty* of the master toward his servant and that the scope of his duty must be founded upon the *nature of the act in respect to which the negligence of the co-employee occurs.*[2] *Mather* v. *Rillston* and *Texas & Pac. Ry. Co.* v *Barrett* indicate that there is a principle of liability outside of the "safe place" and "safe appliance" test to which expression has not yet been given.[3] The writer has, therefore, attempted the draft of a principle which, he believes, satisfies the present temper of the court—reconciles the results of cases which are regarded as law

[1] *Supra* pp. 79-81. [2] *Supra* pp. 81-89. [3] *Supra* pp. 89-93

but which cannot be reconciled by any other recognized test,[1]—s consistent with the results of the cases as a whole,[2]—throw light upon the cases where the court has been evenly divided,[3]—and explains the *Ross case* upon a ground perfectly consistent with the later cases which have been thought to overrule it.[4] Restated in its simplest form the principle proposed is this: It is the legal duty of the master to his servant to use due care to provide all permanent conditions of safety for such servants.

ALBERT MARTIN KALES

NORTHWESTERN UNIVERSITY LAW SCHOOL, CHICAGO

[1] *Supra* pp. 94-95 [2] *Supra* pp. 95-97. [3] *Supra* pp. 97-98. [4] *Supra* pp. 98-100.